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December 17, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 30, 2008

Case Number: TSO-0624

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to retain his access authorization.^{1/} The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.^{2/} After reviewing the evidence before me, I find that the Individual's suspended access authorization should not be reinstated.

I. Background

This administrative review proceeding began when a Department of Energy (DOE) Office, suspended the Individual's access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his continued eligibility. In accordance with 10 C.F.R. § 710.21, the DOE Office subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern.

The Notification Letter cited security concerns related to 10 C.F.R. § 710.8(f), (k), and (l). The derogatory information supporting the security concerns is set forth without

^{1/} Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

^{2/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

specifically stating which section is applicable to each of the Individual's actions. Therefore, I have reviewed each of the actions set forth in the Notification Letter and, as set out below, made a determination as to the applicable section.

The Notification Letter states that the Individual was arrested in December 2004 for possession of marijuana and drug paraphernalia. At that time, he pleaded guilty and was sentenced to probation. I find the Individual's possession and use of marijuana constitutes derogatory information under 10 C.F.R. 710.8(k) (hereinafter "Criterion K").^{3/}

The Notification Letter also states that the Individual omitted his December 2004 arrest from his Questionnaire for National Security Positions (QNSP) completed in February 2006. In addition, the Letter states that during two Personnel Security Interviews (PSI), one conducted in November 2006 and the second conducted in May 2007, the Individual falsely denied that the marijuana and drug paraphernalia found in his car during the arrest were his. I find this constitutes derogatory information under 10 C.F.R. § 710.8(f) (hereinafter "Criterion F").^{4/}

Finally, the Notification Letter states that the Individual's arrest for possession and his use of marijuana occurred while he was employed by the DOE and while he was involved in a previous administrative review proceeding regarding his access authorization.^{5/} I have

^{3/} Criterion K refers to information indicating that an individual has "trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C. F. R. § 710.8(k).

^{4/} Criterion F refers to information indicating that an individual "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization." 10 C.F.R. § 710.8(f).

^{5/} The prior proceeding, Case No. TSO-0149, was received by this Office on September 29, 2004. That case involved the Individual's misuse of alcohol. At the time of the Individual's arrest, the hearing in the matter had not yet been conducted. On August 29, 2005, the Hearing Officer issued a Decision in which he concluded that the Individual had resolved the security concerns regarding his use of alcohol and that his security clearance should be restored. *Personnel Security Hearing*, Case No. TSO-0149 (2005).

determined that his arrest and use of marijuana during the administrative review process constitute derogatory information under 10 C.F.R. § 710.8(l) (hereinafter “Criterion L”).^{6/}

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). The OHA Director appointed me the Hearing Officer in this matter, and I conducted a hearing in this case in accordance with 10 C.F.R. § 710.25(e) and (g).

At the hearing, the Individual was represented by an attorney and testified on his own behalf. The DOE Counsel presented no witnesses, but entered 19 exhibits into the record.

II. The Individual's Hearing Testimony

With respect to the Criterion F concern, the Individual acknowledged that he failed to report his December 2004 arrest for marijuana and drug paraphernalia possession on the QNSP. Tr. at 9-10, 13-14. He stated that he did not deliberately omit the arrest, but merely forgot to list it. Tr. at 10, 14, 25-26. He stated that he was under a time constraint because he was only given a short time to complete the QNSP and believed his haste was why he omitted the arrest. Tr. at 22. He testified, however, that he spent three or four nights in jail as a result of the arrest. Tr. at 25-26. In addition, he testified that he was required to submit a monthly statement certifying that he had been arrest-free for six months following the December 17, 2004, arrest. Tr. at 26-27. The Individual also testified that his claim during the two PSIs that the marijuana and drug paraphernalia found during the arrest were not his, but belonged to an acquaintance, was a lie. Tr. at 14, 22. He stated that he deliberately lied to the persons conducting the PSIs in 2006 and 2007 because he panicked. Tr. at 14, 22. At the hearing, he admitted for the first time to the DOE that the marijuana and drug paraphernalia found in his car at the time of his arrest belonged to him. Tr. at 57. He understands that he needs to be completely honest with the DOE in the administrative review process and that his falsifications have caused him and his reputation substantial harm. Tr. at 13.

^{6/} Criterion L refers to information indicating that an individual has “engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. §710.8(l).

Regarding the Criterion K concern, the Individual stated at the hearing that he has not used or possessed marijuana since his arrest on December 17, 2004. Tr. at 15. As to the Criterion L concern, the Individual testified that he did not report his arrest as required to DOE in December 2004. Tr. at 50. He decided not to report the incident because he was in the midst of another administrative proceeding regarding his access authorization. Tr. at 50. See footnote 4 above.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of the national security test” for the granting of security clearances indicates that “security-clearance determinations should err, if they must, on the side of denials.”) *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005 (1995), *aff’d*, (1995). See 10 C.F.R. § 710.7(c). In the end, like all OHA Hearing Officers, I must exercise my common sense judgment in determining whether an individual’s access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by the Notification Letter.

IV. Findings and Conclusions

A. Criterion F

In a number of decisions, OHA Hearing Officers have considered the implications of falsifications and omissions. The factors I must consider are whether the individual came forward voluntarily to renounce his falsifications or omissions, the length of time of falsehood or omission was maintained compared to the length of time the individual has been honest, whether there is a pattern of falsifications or omissions, and finally, the amount of time that has transpired since the individual’s admission. See *Personnel Security Hearing*, Case No. TSO-0587 (2008), and cases cited therein.

In this case, the Notification Letter indicates that the Individual deliberately omitted relevant and material information from a QNSP in 2006. In addition, the Notification Letter states that he falsified information during two PSIs, one in 2006 and the second in 2007. The Individual testified that he did not deliberately omit his December 17, 2004, arrest from the QNSP, but rather he was rushed in completing the form and forgot to include the arrest. He further testified that he panicked during the PSIs and, therefore, lied about who owned the marijuana and drug paraphernalia found in his car during the December 17, 2004, arrest.

Initially, I do not believe the Individual's testimony that he forgot about the arrest when he was completing the QNSP because he was hurried. He testified that he was incarcerated for three to four days. He also testified that he was required to send a monthly statement to the prosecuting authority for six months following his arrest to certify that he had not been arrested subsequent to December 17, 2004,. I believe these two conditions, his incarceration and the monthly statement he was required to send for six months, are onerous enough that the Individual would be highly unlikely to forget the arrest. In addition, I believe his falsifications during the PSI regarding ownership of the marijuana and drug paraphernalia were a further, deliberate attempt to misrepresent information to the DOE. Therefore, I find that the Individual deliberately omitted his arrest from the QNSP and subsequently falsified information to the DOE during the access authorization process.

The Individual's testimony at the hearing is not sufficient to mitigate the Criterion F security concern. The Individual has shown a pattern of deception by giving false answers during two PSIs and omitting information from the QNSP. Also, he did not come forward on his own to report the December 17, 2004, arrest; it was discovered during a background investigation. When the Individual was asked about the arrest at the PSI, he admitted to the arrest. However, he furthered the misrepresentation by claiming that the marijuana and drug paraphernalia did not belong to him. Lying during the PSIs after omitting information from the QNSP shows a pattern of misrepresenting information to the DOE. He maintained the misrepresentation for more than two years, continuing to lie to the DOE during two PSIs in 2006 and 2007 regarding ownership of the marijuana and drug paraphernalia found in his car. He finally admitted to ownership of the marijuana and drug paraphernalia at the hearing in 2008. Finally, his falsifications are recent, having occurred in 2006 and 2007. Even at the hearing, he gave an unpersuasive explanation for his inaccurate QNSP, claiming that he was hurried and forgot. Therefore, I find that the Individual has not mitigated the security concerns raised by Criterion F.

B. Criterion K

With regard to Criterion K, the Individual admitted at the hearing that the marijuana and drug paraphernalia found in his car during his December 17, 2004, arrest were his. He

stated that he last used marijuana the day prior to his arrest. On December 17, 2004, the date of his arrest for possession of marijuana and drug paraphernalia, he was in the midst of a previous access authorization review process initiated by DOE. He has provided no information to mitigate the concern. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House) (Adjudicative Guidelines). Although he stated that he has not used marijuana since his 2004 arrest, he did not bring forth testimony from any other source to corroborate his claim. Therefore, I find that the Individual has not provided any mitigation regarding the Criterion K concern and the Criterion K concern has not been resolved.

C. Criterion L

As stated above, the Individual's arrest for possession of marijuana and drug paraphernalia while he was involved in a pending administrative review process for his security clearance gives rise to a Criterion L concern. In addition, I believe that the Individual's admitted use and possession of marijuana while knowing that DOE has a policy of zero tolerance for drug use, along with his failure to report his arrest to the DOE within 24 hours, also form the basis for a Criterion L security concern. The Individual presented no evidence to refute these Criterion L security concerns raised by the DOE. He admitted that he did not report his arrest in the prescribed time frame. In addition, he admitted that he used and possessed marijuana while involved in the administrative review process and knowing the DOE had a zero tolerance policy for illegal drugs. Based on the foregoing, I find that the Individual has failed to mitigate the security concerns raised by Criterion L.

V. *Conclusion*

As the foregoing indicates, the Individual has not resolved the Criteria F, K, and L security concerns cited in the Notification Letter. Therefore, I must conclude that the Individual has not shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: December 17, 2008